No. 54

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

[redacted]
Solicitor General,
[redacted]
Assistant Attorney General,
[redacted]
[redacted]
[redacted]
[redacted]
Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

Statutes—Continued

Miscellaneous:

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OPINION BELOW

The opinion of the district court (R. 194–199) is reported at 158 F. Supp. 333.

JURISDICTION

This suit was brought under § 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 4. The order of the district court dismissing the action was entered on January 28, 1958 (R. 199), and the notice of appeal was filed in that court on February 21, 1958 (R. 200). This Court noted probable jurisdiction of the appeal on June 16, 1958 (R. 204). The jurisdiction of this Court is conferred by § 2 of the

Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. 29), as amended by § 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

STATUTES INVOLVED

The pertinent provisions of §§ 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1 and 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
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> * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provisions of §§ 221 (a), 222 (c) (1), 310 (b), 311, 313 and 414 of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U. S. C. 151 *et seq.*), are as follows:

> SEC. 221. (a) Upon application of one or more telephone companies for authority to con-

solidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford such parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

* * * * *

SEC. 222. (c) (1) Whenever any consolidation or merger is proposed under subsection

(b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of the Army, the Attorney General of the United States, the Secretary of the Navy, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. * * *

* * * * *

SEC. 310. (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any

corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this Act for the permit or license in question; * * *

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313.

* * * * *

SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any

of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

* * * * *

SEC. 414. Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission in permitting an exchange of broadcasting licenses precludes the United States from subsequently maintaining a Sherman Act suit charging (a) a conspiracy in restraint of trade which was partially effectuated by a broadcasting station acquisition involved in the license exchange permitted by the Commission, and (b) a contract in restraint of trade, namely, the station exchange agreement.

2. Whether the action is barred, under general equitable principles such as laches and estoppel, because the complaint was not filed before the station exchange was consummated.

STATEMENT

The Government brought this civil action under § 4 of the Sherman Act charging the Radio Corporation of America (RCA) and its wholly-owned subsidiary, the National Broadcasting Company (NBC), with violations of § 1 of the Sherman Act (R. 1). After a preliminary hearing on the validity of the defendants' affirmative defenses based on the Federal Communications Commission's permission for one of the acts charged, the district court sustained the defenses and dismissed the action (R. 199). This appeal followed.

1. The facts alleged by the Government[1] to constitute the violation of the Sherman Act were as follows: In February 1954, NBC owned five VHF television stations, the maximum number allowed under the Commission's licensing rules. The "markets" (*i. e.*, metropolitan areas) in which they were located, and the ranking of those markets in terms of both population and retail sales, were (R. 5): New York (1), Chicago (2), Los Angeles (3), Cleveland (10) and Washington (11). In numerous conferences and communications between RCA and NBC it was decided that NBC should dispose of its two stations in the smaller markets, Cleveland (10) and Washington (11), and acquire in their stead two stations within at least the eight largest markets (R. 6). RCA was interested in this acquisition not only indirectly as the parent of NBC but also because of the direct benefits

[1] In the complaint (R. 1–8), as elucidated by the Government's answers to the defendants' interrogatories (R. 33–46) and its motion for production of documents (R. 19–22).

to it, such as the enormous advertising value in the sale of RCA consumer goods of the repetitive mention of its name in connection with the station's identification (R. 20) and the value of the NBC-owned stations in the promotion of color television in the larger markets (R. 20–21). See also R. 45. To accomplish this, it was determined that NBC—which, in addition to its broadcasting stations, owned and operated one of the two major networks—would utilize its power to withhold network affiliation[1] to induce station owners in two of the eight primary markets not already occupied by NBC (*i. e.*, Philadelphia (4), Detroit (5), Boston (6), San Francisco (7), or Pittsburgh (8)) to exchange such stations for NBC's stations in Cleveland and Washington (R. 6, 41).

In furtherance of this conspiracy, NBC approached the Westinghouse Broadcasting Company (Westinghouse) to negotiate an exchange of its station in Cleveland for Westinghouse's in Philadelphia.[2] NBC threatened, unless Westinghouse agreed to the exchange, to discontinue Westinghouse's NBC network affiliations in both Boston and Philadelphia; to refuse affiliation for a station then being acquired by Westinghouse in Pittsburgh; and to refuse affiliation for any further stations Westinghouse might acquire

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[1] The complaint alleged that "Affiliation * * * is generally essential to the economic survival of television stations except in the three largest major markets" (R. 4).

[2] Initially NBC had proposed to exchange its two stations in Cleveland and Washington for Westinghouse's two stations in Philadelphia and Boston, but the negotiations were ultimately limited to the exchange involved here (R. 55).

in the future (R. 6–7). Thereafter NBC and Westinghouse entered a contract providing that, upon obtaining the required Commisison consent to the license exchange, NBC would exchange its Cleveland station, plus $3,000,000, for Westinghouse's Philadelphia station (R. 7, 140). The agreement further required NBC to give Westinghouse an NBC affiliation for the Cleveland station (R. 143–144). Though not incorporated into the formal exchange contract, it was also agreed that NBC would not enter the Boston market with its own station and would continue Westinghouse's NBC affiliation there and that NBC would grant NBC affiliation for Westinghouse's proposed Pittsburgh station (R. 44).

On December 21, 1955, after investigation but without a hearing, the Commission entered an order, without opinion,* approving the license exchange (R. 152). The properties were exchanged on January 22, 1956 (R. 140). With only half of the object of the conspiracy thus accomplished, the conspiracy continued at least to the date of the complaint filed in this action (R. 6, 40). In addition, under its agreement with Westinghouse, NBC remained under a continuing duty not to enter the Boston market and to continue Westinghouse's NBC affiliations (R. 44).

On these alleged facts, the Government charged both a conspiracy (between RCA and NBC) and a contract (between NBC and Westinghouse) in unreasonable restraint of trade, in violation of § 1 of the Sherman Act. The relief requested was that the

* See note 5, *infra*.

court adjudicate that the conspiracy or combination, and the exchange agreement, were illegal; require NBC to divest its Philadelphia station; revoke the station license; grant injunctive relief; and require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets (R. 8, 45, 188).

2. In their answer, appellees raised the following affirmative defenses: (1) that the action was barred by the administrative finality of the Commission's action; (2) that, for the same reason, the district court lacked jurisdiction over the subject matter of the suit; and (3) that the doctrines of res judicata and collateral estoppel precluded the Government from maintaining the action (R. 31–32). The Government moved, pursuant to Rule 12 (d) of the Federal Rules of Civil Procedure, for a preliminary hearing and determination before trial of the sufficiency of these three defenses (R. 102). Appellees moved to dismiss the complaint for lack of jurisdiction or, in the alternative, for summary judgment in their favor, based on these affirmative defenses (R. 165–166).

The parties entered into a stipulation "for the purpose of any determination of the merits of" the three defenses (R. 137). The stipulation stated, *inter alia*, that after NBC and Westinghouse had filed their applications with the Commission for approval of the station exchange, the Commission notified the Department of Justice that the applications raised possible antitrust questions; that the Commission conducted an extensive investigation of the proposed exchange and the negotiations leading to it and kept the De-

partment of Justice fully informed as to the evidence which it had in respect thereto; that in considering the proposed exchange, the Commission "had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws," and that the Commission "decided all issues relating to the exchange which it could lawfully decide"; that in granting the applications the Commission "had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action"; and that, although the Department of Justice had the right to request that the exchange applications be set for hearing, to request re-consideration, to protest the Commission's decision, and to obtain judicial review of the decision by appeal under the Act, it did not "exercise any of these rights" (R. 138–140).

3. On January 10, 1958, the district court held that the affirmative defenses were "valid and constitute a bar to the prosecution of this suit" and dismissed the action (R. 199). The court upheld appellees' contention that appeal to the Court of Appeals for the District of Columbia Circuit, under § 402 of the Communications Act, was the "exclusive means by which an order of the Commission may be reviewed by the courts and that, no appeal having been taken, the Court lacks jurisdiction of this suit" (R. 195).

It further ruled that, even if it had jurisdiction, it could not "properly exercise it" (R. 197). The court stated (*ibid.*) that the Commission had before it all the evidence on which the antitrust suit was based; that the Commission was "under a duty to pass upon the issues presented by this evidence"; and that there

was "no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States."[5]

Finally, the court held there was an additional "compelling reason why this suit should not be proceeded with" (R. 198). The court stated (R. 199) that the Commission's approval was not granted until more than four months after the Antitrust Division had been officially notified of the proposed transaction "and alerted for possible antitrust features"; that the transaction was consummated after the time for appeal from the Commission's order had expired and it involved an exchange of millions of dollars worth of property, $3,000,000 in cash, and "extensive changes in personnel, organization and operating procedures"; and that the present suit "presented no new facts and nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming."

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[5] The Commission issued no opinion in approving the exchange. However, in a dissenting statement one Commissioner questioned whether "certain provisions of the Clayton Act (via 15 U. S. C. Section 18) might prevent the Federal Trade Commission and Justice Department from taking any *effective* action in the event they concluded that possible violations of the antitrust laws were involved in the circumstances of these transactions" (R. 156). In reply, two Commissioners stated (R. 165):

> No restraint of trade, or attempt to monopolize television services in any of the trading areas involved are discernible in this exchange transaction.
>
> It is difficult to see how approval of this exchange may effectively preclude other governmental agencies from ex-

SUMMARY OF ARGUMENT

1. In determining whether to grant a license or to approve a transfer of an existing license, the Commission's only function is to determine whether the "public interest, convenience, and necessity will be served thereby" (§ 310 (b)). In doing so, it is not charged with "the duty of enforcing" the Sherman Act or applying "the antitrust laws as such," although obviously it "should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223–224. Accordingly, as the Commission stated with respect to this case, while it "considers and evaluates the conduct of applicants insofar as it relates to matters entrusted to the Commission * * * [it] does not, and did not here, purport to enforce the antitrust laws or to determine whether particular practices are violative of such laws; it analyzes the 'substance of these practices * * * to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest'" (Supp. Mem. 7). In short, it considers such conduct only to the extent necessary in formulating a final judgment

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amining into this or any other transaction of the network companies. Specific intent to restrain trade or to monopolize can seldom be spelt out of a single transaction—whether approved by a governmental agency or not. A plan or a scheme generally consists of a pattern of conduct. Such an over-all look is still available to the F. C. C. or any other governmental agency.

whether the license transfer would be in the "public interest"; it makes no independent "findings" or "decisions" as to those issues which could be in any way relevant for any other purpose.

But even if the Commission had made express findings that the conduct was not illegal, they could be of no effect in this action. Clearly collateral estoppel—the only theory under which the "findings" as distinguished from the "order" itself could be relevant—could not apply to a mere conclusion of law made by an administrative agency without a hearing in a proceeding to which the party sought to be bound (the Government) was not a party. Thus the only possible question is whether the order itself, quite apart from the alleged findings on which it was based, operates under the Act to exempt from the antitrust laws the acquisition thereby "authorized".

2. Admittedly the Act provides no express exemption from the antitrust laws for conduct authorized by the Commission in radio licensing proceedings. Since exemptions from the Sherman Act are not to be implied (*United States* v. *Borden Co.*, 308 U. S. 188), that should conclude the matter. In any event, the Act affirmatively shows that no such exemption was intended.

In the provisions of the Act dealing with telephone and telegraph companies—over which the Commission has much more extensive regulatory powers than it does over broadcasting—Congress expressly provided that consolidations or mergers of such companies approved by the Commission would be exempt

from the antitrust laws (§§ 221 (a), 222 (c) (1)). This detailed specification of the circumstances under which Commission action results in antitrust immunity precludes a finding of an implied exemption in other circumstances.

In addition, the provisions specifically applicable to radio broadcasting affirmatively show that Congress intended to make radio licensees fully subject to the antitrust laws. Section 313 expressly declares that "All laws" relating to monopolies and restraints of trade are "to be applicable to * * * interstate or foreign radio communications," and provides that if, in "any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws," a licensee is found guilty of antitrust violations, the court may "in addition to the penalties imposed by said laws" order the revocation of his license. Section 311, in turn, requires the Commission to refuse a new license to any person whose license has been so revoked. Thus, far from making the Commission's conclusions on such questions binding on the courts, the Act does just the opposite and reaffirms the primary jurisdiction of the courts over such matters, making their determinations conclusive on the Commission. The legislative history, in turn, demonstrates that that was the very purpose of those provisions.

3. The lapse of 11 months between the Commission's order and the filing of the complaint is clearly not an adequate basis for barring this action under general equitable principles. Obviously the Government

could not have completed its investigation, resolved the questions raised, and drafted a complaint before the exchange was consummated (only 32 days after the order), and the time required thereafter to complete the necessary steps was not only reasonable but did not prejudice appellees. The real basis for the district court's view seems to have been its conclusion that the Government should have appealed from the Commission's order, but that action could at most have resulted in setting aside the Commission's order and would have afforded no relief against the continuing conspiracy alleged in the complaint. Nor have appellees shown that they consummated the exchange in the reasonable belief that they would not be proceeded against for the serious antitrust violations alleged here. At all events, tardiness in bringing the suit could not immunize appellees from liability for their violations. For, "even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government" in insuring compliance with the antitrust laws "are not to be forfeited as a result." *United States* v. *California*, 332 U. S. 19, 39–40.

I

THE COMMISSION DID NOT DECIDE THE ANTITRUST QUESTIONS

In dismissing the complaint the district court ruled that "in finding that the exchange was in the public interest, it [the Commission] necessarily decided

(whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States" (R. 197). Since that decision was not challenged by a direct appeal from the Commission's order (R. 195–196), the court held, apparently on the basis of principles "akin to res judicata" (R. 195), that Commission approval of the license exchange barred a subsequent antitrust suit challenging conduct which included the exchange.

1. The decision below rests upon a basic misconception of the Commission's functions. In granting, renewing, or authorizing transfers of broadcasting licenses, the Commission's sole function is, in the language of the section specifically applicable to transfers, to determine whether "the public interest, convenience, and necessity will be served thereby" (§ 310 (b)).* Obviously, "competition is a relevant factor in weighing the public interest." *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 94; see also *Mansfield Journal Co.*

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*In approving a license "exchange" the Commission's function is, of course, no different from the function it performs in granting or renewing station licenses generally. See § 310 (b). In contrast to its extensive regulatory powers over telephone or telegraph companies (see §§ 201–222), the Commission has no direct control or power over the financial or other business activities of radio licensees as such. Its only powers are to grant or withhold broadcasting licenses, without which, of course, the applicant's future broadcasting will be illegal. Thus the substance of its action in this case was simply to grant NBC authority to broadcast television programs in Philadelphia for the period of the license, while simultaneously authorizing Westinghouse's broadcasting in Cleveland.

v. *Federal Communications Comm'n*, 180 F. 2d 28, 33–34 (C. A. D. C.). The Commission is not, however, charged with "the duty of enforcing" the Sherman Act or "apply[ing] the antitrust laws as such," although it should, of course, "administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223–224.

Thus, while the Commission quite properly takes into account the policies of the antitrust laws in administering its licensing powers, it has neither the authority nor the duty to conduct "trials" to "adjudicate" the legality of an applicant's conduct under the antitrust laws—or, for that matter, any other laws. Evidence indicating that there may have been violations of such laws is relevant insofar as it bears on the ultimate question of whether the requested license will be in the public interest; but it is relevant for no other purpose and can have no other effect. Likewise the Commission's views, if any, as to the legality of an applicant's conduct are no more than tentative judgments reached by the Commission in weighing the effect of such conduct on the applicant's qualifications to operate the station in the public interest. They are in no way intended to be a final or conclusive determination of such issues or to bind other agencies directly concerned with the enforcement of such laws.

In this case, since the Commission neither held a hearing nor announced an opinion, it is impossible to tell from the record what the Commission con-

cluded with respect to the antitrust violations alleged here. The district court apparently relied on the stipulation, entered into for purposes of the preliminary ruling on the affirmative defenses, that "In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws" and that the Commission "decided all issues relating to the exchange which it could lawfully decide" (R. 139). But, as the Commission itself recognized, it had no power to "decide", in any meaningful sense, questions as to the legality of an applicant's prior conduct. As the Commission stated in its memorandum filed in support of the Jurisdictional Statement, while it "considers and evaluates the conduct of the applicants insofar as it relates to matters entrusted to the Commission * * * [it] does not, and did not here, purport to enforce the antitrust laws or to determine whether particular practices are violative of such laws; it analyzes the 'substance of these practices * * * to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest'" (Supp. Mem. 7). It is clear, therefore, that the Commission in fact did not decide that NBC had not violated the antitrust laws. At most, it held only that the evidence before it, unshaped by any formal charge of antitrust violation or even public hearing, did not constitute a sufficient basis for concluding that the license exchange would not be in the public interest. Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Comm'n*, 343 U. S. 414, 422.

2. But even if the Commission had made express findings, that there had been no violation of the antitrust laws in the events leading to the exchange or in the exchange itself, it is difficult to see how such a finding could in any way be conclusive in a subsequent antitrust proceeding. It may be conceded that the Commission's order was reviewable only by the court of appeals on direct review under § 402 (b) of the Act, but that establishes only that the order was *final* and is of no help in determining what the *effect* of the order was. On its face, its only effect was to grant NBC a license to broadcast in Philadelphia. But since the Act expressly provides that licenses granted by the Commission may be revoked in antitrust proceedings (§ 313, discussed *infra*, pp. 27-34), that is of no help to appellees here, and they must rely instead upon some collateral effect of the order.

What the district court seems to suggest, and appellees to argue, is that, although the order did not in itself exempt appellees from antitrust proceedings, the alleged subsidiary "finding" that there was no antitrust violation operates by way of principles "akin to res judicata" (R. 195) to control the disposition of that issue in any subsequent proceedings. The analogy, presumably to the doctrine of collateral estoppel, is unsupportable; and one may doubt whether appellees would accept the conclusion, implicit in their argument, that a denial by the Commission of an application on the ground that the arrangements were in violation of the antitrust laws would, in subsequent Sherman Act proceedings, constitute a bind-

ing determination of the illegality of such arrangements. The Commission is an administrative agency, not a court, and its "findings" have only such effect as Congress chooses to give them. Quite apart from that, however, the alleged finding here in no way meets the requirements of collateral estoppel: the finding, if any, was one of law and not of fact; there was no adversary proceeding, no hearing, and no "litigation" of the issue; and neither the Government nor RCA was a "party" to the proceeding.

Clearly, therefore, notwithstanding the appellees' charge that the distinction is "semantic" (Motion to Affirm, p. 5), the only theory upon which the Commission's order could preclude the instant action is by finding in the Communications Act an intent to exempt from the antitrust laws transactions "authorized" by the Commission.

II

THE ACT DOES NOT EXEMPT FROM THE ANTITRUST LAWS TRANSACTIONS APPROVED BY THE COMMISSION IN RADIO LICENSING PROCEEDINGS

There is, of course, no express provision in the Communications Act creating an exemption from the antitrust laws for conduct authorized by the Commission in radio licensing proceedings.[1] In view of

[1] For that reason, we fail to see the relevance of *Far East Conference* v. *United States*, 342 U. S. 570, relied on by the district court. Under the terms of the Shipping Act there involved, the Federal Maritime Commission was expressly given the power to approve conference rate agreements complying with the terms of the Shipping Act and thereby exempt them from the antitrust laws. The question was whether the Gov-

the settled principle that exemptions from the Sherman Act are not to be implied (*United States* v. *Borden Co.*, 308 U. S. 188; *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196), that should be conclusive that the Commission's action has no such effect. That no such exemption was intended, moreover, is shown by the face of the Act itself, which both (1) expressly confers antitrust exemptions in other circumstances and (2) affirmatively indicates that radio licensees are to remain fully subject to the antitrust laws.

A. CONGRESS HAS EXPRESSLY DEFINED THE EXTENT TO WHICH COMMISSION ACTION RESULTS IN ANTITRUST IMMUNITY

Under the Communications Act, the Commission has regulatory powers not only over radio broadcasting (which includes television) but also over telephone and telegraph companies. The sections of the Act dealing with the latter contain several provisions expressly conferring antitrust exemptions. Section 222 (c) (1) provides that if the Commission, after hearing and upon notice to the Attorney General and other interested public officials, approves a consolidation or

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ernment could maintain a civil antitrust action to enjoin a rate agreement which had not been passed upon by the Board. The Court held that the Board should first be given an opportunity to exercise its power to determine whether the agreement complied with the Shipping Act requirements and, if so, to exempt it from the antitrust laws. The very premise of that decision, however, was the admitted power of the Board to exempt agreements complying with the Shipping Act from the antitrust laws. Here, on the other hand, it is the *existence* of such a power that is the very question, and it is difficult to see how the *Far East* case has any bearing on that question.

merger of telegraph companies, "thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger." A similar immunity is provided in § 221 (a) for consolidations or acquisitions of telephone companies approved by the Commission.

The Act provides no similar exemption for transactions approved by the Commission in radio licensing proceedings. The inference is inescapable that none was intended. Indeed, if, as appellees argue, the fact of Commission approval without more was enough to create immunity, the express provisions of §§ 222 and 221 would have been unnecessary. It is also significant that § 222 (c) (1) expressly requires notice to the Attorney General and a hearing before the Commission's approval, and consequent antitrust exemption, is given, and § 221 (a) contains comparable safeguards. Had Congress intended radio licensing orders to have the same effect, it would presumably have imposed similar procedural safeguards in such proceedings. Section 310 (b), however, under which the Commission acted in approving the license exchange, neither requires a hearing, provides for formal notice to the Attorney General, nor contains any other provision that would seem to be appropriate, in a proceeding designed to create an antitrust exemption, to assure full representation of the public interest.*

* It may be noted also that the form of the Commission's action in granting licenses or approving transfers seems quite inappropriate for an order designed to exempt the underlying transaction from the antitrust laws. The Commission does not in terms "approve" the underlying acquisition of the properties;

In other areas also Congress has expressly provided the extent to which agency action should result in immunity from the antitrust laws. For example, specific grants of antitrust immunity are provided in the Shipping Act of 1916 (§ 15, 46 U. S. C. 814), the Interstate Commerce Act (§§ 5 (11), 5a (9), 49 U. S. C. 5 (11), 5b (9)), the Civil Aeronautics Act of 1938 (§ 414, 49 U. S. C. 494), the Agricultural Adjustment Act (§ 8b, 7 U. S. C. 608b), the Agricultural Marketing Agreement Act (§ 3 (d), 7 U. S. C. 671 (d)), and the Securities Exchange Act of 1934 (§ 15a, 15 U. S. C. 78*o*–3 (n)). All of these provisions specify in detail the conditions under which the exemption may be provided, carefully delimit its scope, and contain procedural safeguards—such as notice of the proceedings which may result in the exemption, appropriate findings, etc.—designed to assure full consideration of the issue before exemption is conferred.

Thus where Congress has determined that activities by persons subject to the jurisdiction of a regulatory agency should be exempt from the antitrust laws as a result of agency action, it has specifically provided such an exemption in explicit terms which carefully prescribe the conditions under which exemption may be granted. In the absence of such a provision,

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its order, in its formal aspects at least, simply grants to the applicant authority to broadcast for the period of the license. In addition, it is significant that the Commission does not have the extensive regulatory powers over persons engaged in broadcasting that are usually associated with—and which the Commission has, for example, over telegraph and telephone companies—the power to confer antitrust exemptions.

therefore, there can be no basis for inferring an exemption simply because an agency with regulatory powers over the industry has permitted part of a course of action later challenged under the antitrust laws.

That exemptions of agency-regulated industries from the antitrust laws are to be limited to the precise scope of the exemption granted by Congress would seem to be established by this Court's decision in *United States* v. *Borden Co.*, 308 U. S. 188. There the Court upheld a Sherman Act indictment charging a price-fixing conspiracy in the transportation and distribution of milk against an argument that the Agricultural Marketing Agreement Act of 1937, by making such agreements subject to the control of the Secretary of Agriculture, exempted them from the antitrust laws. Although the argument there was distinguishable in that the agreement had not been expressly approved by the Secretary, the basis for the Court's decision is equally applicable here. Referring to two provisions of the Act which specifically exempted certain agreements approved by the Secretary from the antitrust laws, the Court pointed out that "the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable" and concluded that (*id.* at 200–201):

> These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

So also the specific exemptions in §§ 221 and 222 of the Communications Act "show beyond question how far Congress intended that" that Act "should operate to render the Sherman Act inapplicable," and that, if Congress had intended Commission approval of radio license exchanges to confer antitrust immunity, it "would have said so". The principle applied in the *Borden* case—that exemptions from the Sherman Act are not to be implied—has been frequently reasserted in rejecting attempts to read into other acts similar antitrust exemptions for industries subject to agency regulation. *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 206, 209–210; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–457; *Pennsylvania W. & P. Co.* v. *Consolidated G., E. L. & P. Co.*, 184 F. 2d 552, 560 (C. A. 4), certiorari denied, 340 U. S. 906; *Consolidated G., E. L. & P. Co.* v. *Pennsylvania W. & P. Co.*, 194 F. 2d 89, 94–100 (C. A. 4), certiorari denied, 343 U. S. 963; cf. *United States* v. *McKesson & Robbins*, 351 U. S. 305, 316.

B. THE COMMUNICATIONS ACT AFFIRMATIVELY INDICATES THAT RADIO LICENSEES ARE TO BE FULLY SUBJECT TO THE ANTITRUST LAWS NOTWITHSTANDING COMMISSION ACTION

Not only does the Communications Act not expressly grant antitrust exemptions to radio licensees on the basis of Commission action, but to the contrary it contains numerous provisions affirmatively indicating that no such exemption was intended. These provisions show that, while "competition is a relevant factor in weighing the public interest" and thus may properly be considered by the Commission

in exercising its powers (*Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 94), it is the courts, and not the Commission, which have the final power to pass on Sherman Act violations.

1. Section 313 of the Act provides:

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to * * * interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws * * * any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall * * * be revoked * * *.

This provision would seem completely dispositive of the present contentions, especially when its language is compared to that of the exemption provisions of §§ 222 and 221, *supra*. Not only does § 313 provide, in the broadest possible language, that all antitrust laws shall be applicable to broadcasting,[9] but it clearly contemplates that those laws may be enforced by means of independent antitrust proceedings and expressly authorizes a Commission license to be revoked by the court in any such proceeding. In turn, § 311

[9] Section 313 applies to both radio and television broadcasting. *Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (C. A. 3), certiorari denied, 340 U. S. 929.

requires the Commission to refuse a new license to a person whose license has been thus revoked. Thus, far from making Commission action conclusive in antitrust proceedings, §§ 311 and 313 do just the opposite: they make the anti-trust proceedings conclusive on the Commission.

In short, it is the Commission which must follow the courts' resolution of antitrust issues, not the courts which must follow the Commission. It is difficult to see what more express language Congress might have used to achieve that result, and the decision below seems explicable only by reason of the court's failure to mention this provision. In short, by § 313, "Congress considered and expressly saved civil anti-trust suits in this field," and there can be no doubt "that civil actions for anti-trust violations by radio or television stations are cognizable and entitled to decision on their merits in the federal courts." *Packaged Programs* v. *Westinghouse Broadcasting Co.*, 255 F. 2d 708, 709 (C. A. 3)."

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[10] See also § 414 of the Act, which provides that:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

A substantially identical provision of the Civil Aeronautics Act (§ 1106, 49 U. S. C. 676) was held to have been "obviously designed to give survivorship to the remedies embodied in the anti-trust laws" and to preclude any argument that that act vested "primary jurisdiction" in the Board so as to bar a private treble damage action. *Slick Airways* v. *American Airlines*, 107 F. Supp. 199, 217 (D. N. J.), appeal dismissed, 204 F. 2d 230 (C. A. 3), certiorari denied, 346 U. S. 806.

See also § 314 of the Communications Act, which further shows a purpose to make radio licensees subject to antitrust

2. That this was the intended purpose of § 313 is indicated also by the legislative history of that provision. The section was originally enacted as § 15 of the Radio Act of 1927, 44 Stat. 1168. During the Senate debate on that measure, Senator Dill, who was in charge of the bill, was asked whether "there [is] anything in the bill providing in case the applicant for a permit is found to be acting in violation of the Sherman antitrust law or controls a monopoly that the commission may pass upon the question?" Senator Dill replied that, although the bill provided for denial of a license to anybody who "has been convicted under the Sherman antitrust law or any other law relating to monopoly," it "does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court." 67 Cong. Rec. 12507.[11]

The meaning and scope of § 313 are even more clearly illumined by the legislative history of the 1952 amendments to § 311. As originally enacted, § 311 had provided:

> SEC. 311. The Commission is hereby directed to refuse a station license * * * to any person * * * whose license has been revoked by

prohibitions by expressly prohibiting such licensees from acquiring any wire or cable telephone or telegraph line or system where the effect "may be to substantially lessen competition or to restrain commerce * * * or unlawfully to create monopoly in any line of commerce * * *."

[11] The legislative history of the Communications Act of 1934 throws no light on this problem. It shows only that Congress considered Section 313 as "substantially identical" with Section 15 of the Radio Act of 1927. H. R. Rep. No. 1918, 73d Cong., 2d Sess., p. 47.

> a court under section 313, *and is hereby authorized to refuse such station license* * * * *to any other person* * * * [*who*] *has been finally adjudged guilty by a Federal court of* [*antitrust violations*] * * *. *The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for* [*antitrust violations*] * * *. [48 Stat. 1086; italics added.]

The 1952 amendments to the Act deleted the last half of the first sentence plus the entire second sentence (*i. e.*, the portion of the section italicized above). So conclusive on the present question were the reasons given for this deletion by the Senate Committee that we have set forth in a footnote the full text of its report on this amendment.[12] The report is

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[12] Sen. Rep. No. 142, 82d Cong., 1st Sess. 9:

Section 10

This section amends section 311 of the present act which relates to the application of the antitrust laws of the United States. The existing law contains two sections (secs. 311 and 313) which deal with this subject. Section 313 of the present law makes clear that all licensees under the Communications Act come within the provisions of the antitrust laws and that if any licensee is found guilty of a violation of antitrust laws the court may, as an additional penalty, also revoke the license of the person or group found guilty. Section 311 of the present law specifically directs the Commission to revoke any license which the court has ordered to be revoked under the authority of section 313 and authorizes the Commission to revoke the license of a person found guilty of antitrust violation if the court itself has not ordered such revocation.

Licensees have consistently contended during various hearings before this committee that these two sections considered together as now written constitute an unfair discrimination against radio licensees and that such a double

concerned primarily with the reasons for eliminating the last half of the *first* sentence (which had authorized the Commission to revoke a license when a court had found the licensee guilty of antitrust violations even though the court had not itself ordered such revocation under § 313). The committee thought that

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penalty is not imposed upon other classes of business by any other statute.

The committee is impressed with the legal validity of the protests which have been made against this type of double jeopardy. It believes there is merit in the contention that citizens should not be subject to trial for the same allegations before two different tribunals. Moreover, such an argument is particularly pertinent in connection with alleged violations of the antitrust statutes which are the particular province of the Department of Justice and do not, by any other law, come within the jurisdiction of any independent quasi-judicial agency of government.

The committee has made no change in section 313. That section, which makes all licensees amenable to the antitrust statutes and specifically grants the court authority, if a licensee is found guilty of an antitrust violation, to order revocation of his license in addition to all other penalties which may be imposed under authority of the antitrust laws, stands unchanged and unimpaired. It has, however, modified section 311, which gave to the Federal Communications Commission additional authority to institute license revocation proceedings in those cases where a licensee has been found guilty in court of an antitrust violation but where the court did not order revocation of the license issued by the Commission. The modification proposed merely prohibits the Commission from instituting its own antitrust proceeding. It retains the specific authority to refuse a license or permit in those cases in which a court under section 313 has ordered revocation of the license or permit.

The committee desires to emphasize that the Commission's existing authority under law to examine into the character of a licensee or permittee in granting a license or a renewal is in no way impaired or modified by the

that provision, by permitting the Commission to retry the antitrust case and impose an additional penalty not ordered by the court, created a "type of double jeopardy" and that licensees should not thus be made "subject to trial for the same allegations before two different tribunals." It added, reaffirming the primary jurisdiction of the courts over antitrust violations, that: "Moreover, such an argument is particularly pertinent in connection with alleged violations of the antitrust statutes which are the particular province of the Department of Justice and do not, by any other law, come within the jurisdiction of any independent quasi-judicial agency of government." Noting that § 313, "which makes all licensees amenable to the antitrust statutes," remained "unchanged and unimpaired", the committee concluded that "The modification proposed merely prohibits the Commission from instituting its own antitrust proceeding." It is difficult to see how these statements could be used, as the district court used them (R. 196–197), to establish the very opposite proposition—

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change here recommended in section 311. The Commission's authority to determine whether or not the public interest, convenience, or necessity will be served by the granting of a license remains paramount and if it finds that the conviction of a licensee under the antitrust laws or under section 313 has materially affected the character or standing of such licensee so as to warrant refusal of a renewal, or grant of license, it may so proceed. Thus, the Commission's power to protect against monopoly control of radio licenses remains unaffected by the changes herein recommended; it is merely estopped from initiating and proceeding with an antitrust case of its own.

that Congress intended to foreclose judicial proceedings in favor of Commission action.

The Senate committee report did not expressly advert to the reason for the deletion of the *second* sentence of § 311 (which had expressly provided that the granting of a license would not preclude antitrust proceedings). That explanation, however, was supplied by the conference report, which stated that that deletion was not

> * * * of any legal significance. It is the view of the members of the conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law the power of the United States or of any private person to proceed under the antitrust laws would not be curtailed or affected in any way. [H. R. Rep. No. 2426, 82d Cong., 2d Sess. 19.]

In sum, to our view this legislative history clearly establishes that Commission licensing actions were not intended to bar the United States from commencing independent proceedings charging violations of the antitrust laws and naming, among other defendants, Commission licensees. Even absent such an affirmative showing in the legislative history, however, the result would be the same. For "there is nothing in [the Act's] legislative history to show a Congressional purpose to restrict the authority of the United States to maintain suits for every kind of violation of the antitrust laws * * * [and] the absence of more extended discussion of the matter is in itself persuasive evidence that there was no purpose to repeal any por-

tion of § 4 of the Sherman Act." *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 210–211."

"Finally, while we think it unnecessary to reach the question, it should be pointed out that, even if an exemption from the antitrust laws for action "authorized" by the Commission could be implied, it would not necessarily preclude the action here. The most that the Commission could be said to have affirmatively "authorized" by its order was the final exchange itself, and that is only one aspect of the alleged antitrust violations. Since they were commenced prior to the Commission's action, its order could not possibly have "authorized" the conspiracy between RCA and NBC; the coercive use of NBC's control over network affiliations to induce Westinghouse to agree to the exchange; or the collateral terms of the exchange agreement requiring NBC not to acquire a station in Boston and to give Westinghouse NBC affiliations there and elsewhere. Similarly, it is apparent that the order in no way "authorized" the continuing conspiracy charged in the complaint. It would seem that even an express exemption from the antitrust laws of a station acquisition effected pursuant to the Commission's grant of a license would protect the licensee only from antitrust charges based solely on the acquisition itself—*e. g.*, a claim that the acquisition tended to lessen competition and was forbidden by § 7 of the Clayton Act (15 U. S. C. 18)—and would not immunize an unlawful conspiracy or course of conduct of which the acquisition was only a part. Compare, for example, *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, where it was held that the power of the Interstate Commerce Commission to approve filed rates and thereby make them "lawful" (essentially equivalent to exempting such rates from the antitrust laws) did not preclude an antitrust proceeding to enjoin a conspiracy among the railroads to file discriminatory rates. That is, the exemption of the rates themselves did not exempt the surrounding conduct, even though the purpose of it could be achieved only upon Commission approval.

III

THE ACTION IS TIMELY AND IS NOT BARRED BY LACHES OR GENERAL EQUITABLE PRINCIPLES

As an independent ground for dismissing the action, the district court held that the Government should be barred from bringing this action because it did not file its complaint for a period of 11 months following the Commission's order. Noting that the exchange had not been consummated until the time for an appeal from the Commission's order had expired (30 days), and that the consummation involved millions of dollars worth of property and extensive operating changes, the court concluded that this action involved "nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming" (R. 199).

1. Clearly, however, a year is not an unreasonable length of time in which to complete an investigation of an antitrust case (even if in fact no new evidence was discovered), analyze the evidence, study and resolve the inevitably numerous legal questions, and draft the complaint. Moreover, the only prejudice found by the district court arose from the failure to file the complaint before the exchange was consummated (32 days after the Commission's order) and not from the subsequent passage of time. The Government can hardly be criticized for not being prepared to initiate the action within that brief span of time.

It is apparent that the real basis for the district court's conclusion was not that the Government could

reasonably have been expected to file an antitrust suit before the transaction was consummated but rather the court's premise, previously expressed (R. 198), that the Government should have appealed from the order of the Commission rather than initiate an independent action. Clearly, however, the Government was not required so to proceed, and not only would the issues on such an appeal not be the same as those in an antitrust proceeding (cf. *McLean Trucking Co. v. United States*, 321 U. S. 67), but an appeal would not have afforded an adequate remedy. While the Government might have been successful in obtaining the reversal of the Commission's order, it could have gotten no relief against the alleged continuing conspiracy.

Even more basically, however, § 313's legislative history affords no support for the district court's apparent view that the United States is obliged to try its antitrust cases before the Commission. The plain effect of the decision below would be to require antitrust cases to be tried before the Commission, rather than a court, if any part of the conduct involved required a license from the Commission for its consummation. The legislative design revealed in § 313, however, clearly envisages enforcement of the antitrust laws by proceedings in courts, not by proceedings before administrative agencies with limited licensing functions.

Finally, appellees, upon whom the burden lies, have not shown that they reasonably relied either upon the Commission's action or the Government's inaction to conclude that the transaction could or would not be

challenged by the Government. As we have shown, they clearly had no reasonable basis for belief that the Commission's action created an immunity from antitrust suits. To the contrary, they were expressly put on notice of the possibility of such action by the statements filed by two of the Commissioners specifically noting that the Commission's approval could not foreclose investigation of the matter by other agencies (R. 165). Similarly, as to the Government's inaction, appellees have not shown that they believed in good faith that the Government had decided not to challenge the transaction or were otherwise not aware that they were proceeding with the exchange at their own risk.[14]

2. But even if there were tardiness in bringing the action, that could not operate to immunize appellees from suit for their violations. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, this Court rejected the contention that responsibility for antitrust violations could be avoided by showing that the challenged acts were done in reliance upon prior approval by Government officials. In upholding a conviction under § 1 of the Sherman Act for fixing gaso-

[14] Indeed, 10 days prior to the consummation of the exchange, NBC, in a pleading filed with the Commission in a related matter, took the position that

> Congress has made it clear in its enactment of the 1952 amendment to the Communications Act that it did not believe this Commission was the proper forum for the prosecution and adjudication of antitrust litigation (Senate Report 142, 82nd Congress). [NBC's Motion to Dismiss, In re Application of WBUF-TV, Inc., FCC Docket No. 11528, p. 7.]

line prices, the Court ruled (pp. 225–227) that the trial court had not erred in charging the jury that "knowledge or acquiescence of officers of the government [members of the Petroleum Administration Board] * * * would not give immunity from prosecution under that Act" (p. 211). Cf. *Board of Governors of Federal Reserve* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9), where the court sustained the Board's authority to conduct an administrative proceeding under § 7 of the Clayton Act seeking, *inter alia*, to enjoin a bank from acquiring other banks whose acquisition had been authorized by the Comptroller of the Currency.

This Court has pointed out that a "trial court upon a finding of a conspiracy in restraint of trade * * * has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 88; see, also, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188. If the Government can prove its charges against appellees, we believe that the trial court would have a clear "duty" to grant appropriate relief, irrespective of the time which elapsed between the Commission's action and the filing of the complaint, and of the fact that a substantial sum of money and "extensive changes in personnel, organization and operating procedures" had taken place. Cf. *United States* v. *E. I. du Pont de Nemours*, 353 U. S. 586, where a district court was directed to grant equitable relief against an antitrust

violation involving a transaction consummated thirty-five years earlier, and one whose undoing presents numerous complex business and legal problems.

The district court relied (R. 198), as do appellees (Motion to Affirm, p. 10), upon *Hecht Co.* v. *Bowles*, 321 U. S. 321, to support its view that it could deny the Government relief in the antitrust case because of laches and estoppel. That case is inapposite. There this Court held that, under the provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. (1940 ed., Supp. II) 901, 925) for injunctive relief against violations of the Act, the issuance of an injunction was not mandatory upon a showing of violation, but lay within the sound discretion of the district court. But the district court there denied an injunction not because of any alleged laches or estoppel, but because it found that the violations were unintentional, that they had been promptly eliminated upon discovery, and that steps had been taken to prevent their recurrence.[15]

In the instant case, however, the violations were willful, not negligent, and have not been terminated, but have continued to the filing of the complaint. In these circumstances, we submit that it would be an abuse of discretion for the district court, if the viola-

[15] The district court found (321 U. S. at 325–326) that the mistakes brought to light "were all made in good faith and without intent to violate the regulations," that upon discovery the violations "were at once corrected, and vigorous steps were taken * * * to prevent recurrence of these mistakes or further mistakes in the future," and that the company sought to make repayment of all overcharges discovered.

tions charged are proven, to deny any relief because of laches or estoppel. "[T]he standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Hecht Co.* v. *Bowles, supra, at* 331. "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government" in insuring compliance with the antitrust laws "are not to be forfeited as a result." *United States* v. *California,* 332 U. S. 19, 39–40. For principles such as "acquiescence, laches, or failure to act," which might be applicable in private litigation, do not bar the Government from proceeding under federal law to enforce public rights. *Ibid.*

CONCLUSION

The order of the district court dismissing the action should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
BERNARD M. HOLLANDER,
RAYMOND M. CARLSON,
Attorneys.

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